In any event, if the public policy goal of new rules is to produce greater transparency in campaign spending, the Commission is not the best agency to achieve this end. It is the role of the legislative branch and the Federal Election Commission (FEC) to debate, craft, and implement new laws and disclosure requirements in the campaign finance arena.[31] In fact, Congress mandated in BCRA that the FEC must coordinate with other federal executive agencies with election-related information[32] and, unlike the Commission, "shall maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information."[33] Thus, the FEC already has extensive information on its website regarding political campaign spending, including the aggregate amount spent for political broadcast buys.[34] The FEC website also has detailed information regarding the treasurers of campaign committees and the members of the executive committee or board of directors of an entity buying an issue ad. This information is also required to be maintained in the political file and, therefore, will be placed on the Commission's website, duplicating information already available to the government.[35] The record here does not demonstrate that the information provided on the FEC website is not adequate to meet the needs of the general public, including academics, researchers and public interest groups.

It is troubling that the Commission has not adequately analyzed the costs and burdens that these rules will place on broadcasters vis-à-vis any potential benefit to the public interest as outlined in President Obama's 2011 executive order.[36] These requirements will be especially onerous for 1,006 small commercial broadcasters[37] and 391 noncommercial educational stations. Although the requirement to post the political file is prospective, stations nonetheless incur upwards of $80,000 to $140,000 per year, according to the record, in recurring costs to maintain the information.[38] The extra capital and personnel resources needed to maintain an online political file will require broadcasters to make tough choices, such as diverting funds from their newsgathering operations and local programming. These costs will disproportionately harm small and independent broadcasters, especially those owned by women and minorities, which are already experiencing financial pressures in these challenging economic times.[39]

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[31] *See generally* National Association of Broadcasters, Supplemental Comments (Mar. 8, 2012) ("NAB Supplemental Comments").

[32] Bipartisan Campaign Reform Act § 502(c).

[33] *Id.* § 502(a), 2 U.S.C. ¶ 438a(a). *See also* 2 U.S.C. § 434(a)(11)(B) ("The Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public in the offices of the Commission and accessible to the public on the Internet not later than 48 hours (or not later than 24 hors in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission.").

[34] *See* NAB Supplemental Comments at 4 (citing 2 U.S.C. § 434(b)(6)(B)(iii), (c), (f)).

[35] 47 U.S.C. § 315(e)(2)(F), (G).

[36] *See* Exec. Order No. 13563, *Improving Regulation and Regulatory Review* (Jan. 18, 2011).

[37] *See* Order, Appendix B – Final Regulatory Flexibility Act Analysis, at 61 ¶ 8 (recognizing that this number is likely to overstate the number of small entities because the revenues of affiliated companies and not included). These station have revenues of $14 million or less and qualify as small entities under the Small Business Administration definition.

[38] NAB Reply at 12 (stating that the online political file would cost nearly $80,000 per election cycle for temporary sales employees alone); State Broadcaster Association Comments at 12 (stating that the political file and sponsorship identification requirements could cost up to $140,000 per year).

[39] Duhamel Broadcasting Enterprises filed an ex parte letter, along with a Declaration from it Chief Operating Officer, discussing the hardship that an online political file would have on a smaller television broadcasters. *See* Letter from Richard R. Zaragoza, Pillsbury Winthrop Shaw Pittman LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (Apr. 10, 2012). Access.1 Communications, a woman- and minority-owned business, (continued....)

may result in a chilling of speech.[25] Political advertisers may turn to other outlets if advertising on broadcast television imposes disclosure obligations that do not exist for the providers of similar services. Additionally, individuals may be less likely to engage in political discourse if their personal information available on the worldwide web.[26]

The majority argues that, given the statutory requirement to place the specific rate for each political advertisement in the public file, excluding such information from the online requirement "would be contrary to the statutory directive to make the political file publicly available."[27] I respectfully disagree. In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA) amending section 315 of the Communications Act to codify and expand the Commission's political advertising disclosure rules to include, among other things, reporting requirements for political issue ads.[28] Section 315(e) states that "[a] licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time" and that this information must "be placed in a political file as soon as possible. . . ."[29] There is no statutory requirement that the Commission place any of this information, either in whole or in part, on the Internet. Similarly, there is no prohibition against placing a subset of this information online, such as aggregate advertising prices, while maintaining the commercially-sensitive information at the station for the use of candidates, campaigns, other political advertising buyers, and anyone else who is interested. Further, BCRA is not new to the Commission. It was enacted when the Commission determined, in 2007, that it was best to make the political file "available to public inspection" at broadcast stations.[30]

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[25] National Religious Broadcasters, Comments, at 11 (Dec. 15, 2011) ("NRB Comments") (listing, on the Internet, people in leadership positions of issue advocacy groups would burden political speech); Target Enterprises, Ex Parte Presentation, at 15-16 (Apr. 19, 2012) ("Target Ex Parte").

[26] Target Ex Parte at 16 ("This type of online disclosure raises serious privacy concerns and places an unreasonable burden on individuals' First Amendment right to participate in political speech."); NRB Comments at 15-16 ("Further, citizens, faced with . . . national exposure of their names, identities, and organizational affiliations, may well balk at participating in these kinds of civic activities, particularly involving controversial issues, as they face the specter of government-coerced lack of privacy of national proportions... Issue-advocacy groups might avoid advertising on television altogether.").

[27] Order at 21 ¶ 39.

[28] Bipartisan Campaign Reform Act of 2002 § 504, 47 U.S.C. § 315(e) (2002), stating:

> (1) A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time –
> (A) is made by or on behalf of a legally qualified candidate for public office; or
> (B) communicates a message relating to any political matter of national importance, including –
> (i) a legally qualified candidate;
> (ii) any election to Federal office; or
> (iii) a national legislative issue of public importance."

[29] 47 U.S.C. § 315(e)(1), (3). The Commission's rules state that "[a]s soon as possible means immediately absent unusual circumstance." 47 C.F.R. § 73.1943.

[30] I note that section 504 of BCRA was challenged and affirmed by the Supreme Court in *McConnell v. Federal Election Com'n.* 540 U.S. 93, 233-246 (2003). While it is true that this decision upheld section 504, the court did not consider an online filing requirement for the political file or the implications thereof. In fact, Justice Breyer, on behalf of the majority, upholds the broadcaster disclosure, because it is virtually identical to what was in the Commission's rules, at that time, and the regulation caused little burden. The majority, in this order, is now changing the disclosure mechanism in a manner that will increase burdens.

Finally, these online requirements will hamper the Commission's personnel and financial resources.[40] Although I have the utmost confidence in the Commission's staff, I do have reservations regarding our ability to host and maintain such databases. The Commission must test any system before going live to ensure reliability, ample capacity, and efficiency. We must fully understand the capabilities of the proposed database in determining filing requirements and deadlines. In these times when the government is making do with less, I question whether implementing a new and complex database is the best use of Commission assets.

Accordingly, I respectfully approve in part and dissent in part.

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filed an *ex parte* letter expressing concerns about the burdens of an online political file and the harms of placing commercially-sensitive rate data on the Internet. *See* Letter from Chesley Maddox-Dorsey, Chief Executive Officer, Access.1 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (Apr. 20, 2012).

[40] In this order, the Commission committed to undertake the following: establishing and maintaining a website; importing broadcasters' documents that are already on the Commission site; creating specific organizational subfolders for candidates and issue ads that relate to a political matter of national importance; programming the database to use optical character recognition on materials that are scanned and non-searchable and generate electronic backup copies of online files; making Commission staff available to assist station with any issues; exploring the creation of user or peer support groups; creating a mechanism to identify documents beyond the retention period to be flagged for review by broadcasters to be eliminated from the database; amongst others.

STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations (MM Docket No. 00-168) and Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398) (MM Docket No. 00-44)

Striking a balance via FCC rulemakings can at times be elusive. As an idealist, I always hope that all parties find satisfaction in everything we do. While we achieve industry – *and FCC* – consensus on a great many items, 100% harmony is difficult. This is why the Chairman has wisely partnered with the private sector on a number of major initiatives, and why I mention the power of public-private partnerships in nearly every speech I give.

So it is in that vein that we come to this item, which has been much discussed and hotly debated over the past month.

When we last gathered in this room to discuss this subject, I was again reminded that the words "disclosure" and "transparency" inspire confidence, increase the public's trust, and convey good faith. The American people not only want those things, they *demand* them, and that is the basis for my approval of this item.

In putting these files online, the FCC is requiring broadcasters to take a step that innumerable other entities have opted for since the World Wide Web became a part of our daily lives, and putting public files on the Internet in 2012 makes sense. It is the expected means of data viewing, and this action requires no unreasonable amount of production or disclosure.

And I am happy to report the overwhelming consensus that surrounds those sentiments. Like many in this room, I attended the National Association of Broadcasters gathering a couple of weeks ago, and was told by many participants that putting their public files online was a logical outgrowth of the ubiquity of public information made viewable by the Internet.

But it is important to strike a balance. I have repeatedly mentioned that one of the paramount considerations regarding this implementation is that we take into account and minimize the burden on industry.

The FCC listened to broadcasters while developing a system that keeps the burden of this new regime as low as possible, and I commend our Media Bureau for its diligent work in this regard. The Commission has devised a scan and upload system that is as user-friendly as it is sensible, and should require minimal effort to execute. While it will involve more labor, I firmly believe that any inconvenience will be offset by the public benefits.

For the public is our greatest watchdog, and media observers from all corners, students, teachers, Ph.Ds, whistle-blowers, grassroots organizations, or people with a lot of time on their hands serve overwhelmingly as the best source of information regarding compliance or noncompliance with our rules. We should all embrace this, as actors like these are an integral part of our democratic fabric. Moreover, if the FCC can be instrumental in giving them better tools to do so, I feel that it must.

I firmly believe that this item does just that. Those who follow the use of local programming and reporting, *or lack thereof*, can scan the disclosure files from broadcast stations across the nation and use that information for any reason they choose. Maybe it's to scrutinize the programming and ad revenue of

stations, or maybe it's to applaud it. Or perhaps a professor in Wyoming wants to analyze what local content is being shown in Brooklyn, New York.

I see no reason to limit the reach of the online public file. We do not restrict, in any way, shape or form, who can access the existing paper files, and I see no need to do so for this new regime. I reject the claims that to do so would go against the principles and aims of localism, and feel that universal online availability is well within the letter and spirit of our direction from Congress.

The point isn't so much what the use of the information from an online public file will be, but simply the *ability to use it.* The relevant governing statute uses the words "convenience" and "necessity" in discussing the public interest aspects of renewals of broadcast licenses, and our actions via this rulemaking speak to such principles.

I've heard many stakeholders significantly downplay the interest in broadcaster files by members of the American public. I've also heard that there's a better likelihood of an asteroid hitting Earth today than two people walking into a local affiliate station seeking to view these records. But again, such speculation is pointless. Ours is not to keep track of such things, but rather to ensure the availability of relevant files, regardless of how many sets of feet *do or do not* walk into a station. What we do via this item will take this availability into the 21st century.

Included in this new regime, will be the political files of broadcast stations, which are currently viewable within those entities – and no where else. Within these files are records of candidates' requests for airtime, a run-down of the time purchased, and other pertinent information. This is required by statute. Congress deemed this data to be within the public's interest to know, and have access to, and the FCC is the cop on the beat in monitoring compliance. This information also affords the American electorate an opportunity to see how much money is being expended on behalf of a candidate, and during what days and hours.

In an era when political ad spending is well into the billions, many are clamoring to learn what people and groups behind the advertisements. However, that curiosity is not what guides the FCC. What we are charged to do is to assure that such information is available, and now it will be even more so on the Internet.

But concerns arose regarding the widespread dissemination of the itemization of political ad spending and how the containment of it within broadcast stations is where it should remain. More to the point, a global window into the lowest unit charge afforded to political ad spending was a point of contention to many, in that corporations and other ad buyers could use such knowledge to leverage their own negotiations.

I wrestled long and hard with this, and was intent on giving these arguments due consideration.

What was always at the forefront of my mind, however, is the fact that this information is currently available for any and all to view. But during my time as a publisher of a small weekly newspaper, I learned very quickly how difficult it is to generate ad revenue and how painful it can be to be gamed by entities who try to talk you down dollar by dollar. These concerns swam around in my head as I considered the arguments of those against putting detailed information on a platform that the world can view, and I made my thoughts known to my colleagues.

We ended up, after much discussion, including language in the item that serves as a kind of checkpoint, which will allow us to assess the impact and effect of putting the rate information online. Our rulemaking mandates that over the next two years, only stations affiliated with the top four national

networks, and that are licensed to serve communities in top 50 designated market areas would be required to post new political file documents in our online database. However, one year into that timeline, and one year before all other stations – large *and* small – must follow suit, we will issue a Public Notice that will seek comment on what, if any, unforeseen burdens or harmful effects have arisen and whether changes need to be made.

I feel this ability to revisit our actions today and consider whether to alter them if necessary is a sensible, prudent, and measured way to proceed. And while it may not be an ideal fix for all of the critics of our path forward, I think it is a worthwhile, middle ground approach.

As to the concerns about the burdens associated with putting rapidly-changing political ad information in an online public file, I am confident that the system we devise will offer a well thought-out and technologically straightforward method for the uploading and submission of relevant data. The format set forth in the item is well-conceived, and stops short of mandating that broadcasters change the structure of the documents they currently use.

This should allow for the uploading of various documents in different formats and will eliminate the need for converting filings in order to match a certain program.

The public will be aware of the online public file via on-air and website-based announcements, and we hope such outreach will bring fresh interest.

To reiterate, this agency functions at its best when it works in concert with the individuals and corporations and individuals we oversee and regulate. The staff worked very hard on this item, and took the predictions of future hardships seriously. I weighed them also against the need for bringing disclosure into the new mainstream – on the web – and I am proud of this agency, in particular our Media Bureau, for doing its absolute best to take into account the worries and sensitivities of the broadcast industry. What we put forth today is a proper interpretation of the law governing broadcast disclosure, with the main beneficiary being the American public. This enhanced transparency is in keeping with the times, and is a big, overdue step forward.

I want to thank Bill Lake and his superb team in the Media Bureau for their tireless work on this item. Mary Beth Murphy, Bob Ratcliffe, Bobby Baker, Hope Cooper, and Greg Elin were integral to this effort, and I want to put special emphasis on Holly Saurer, who worked day and night and deserves some additional combat pay. She was of great assistance to my office, and I am very grateful.